U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 November 2002

Case No.: 1996-CAA-0008

In the Matter of:

DAVID MARSHALL HIGH,
Complainant

v.

LOCKHEED MARTIN ENERGY SYSTEMS, INC.,

and

LOCKHEED MARTIN CORPORATION,
Respondents

RECOMMENDED DECISION AND ORDER ON REMAND
GRANTING SUMMARY JUDGMENT

This matter comes before me at this time to consider the Respondents' Motion for Summary Judgment.

Background

On December 12, 1995, David M. High filed a complaint against Lockheed Martin Energy Systems, Inc., Lockheed Martin Corporation, Oak Ridge Operations Office, and the U.S. Department of Energy, alleging violations under the Energy Reorganization Act, 42 U.S.C. § 5851; the Clean Air Act, 42 U.S.C. § 7622; the Toxic Substances Control Act, 15 U.S.C. § 2622; the Comprehensive Environment Response, Compensation and Liability Act, 42 U.S.C. § 9610; the Solid Waste Disposal Act, 42 U.S.C. § 6971; and, the Safe Drinking Water Act, 42 U.S.C. § 6971.

Lockheed Martin Energy Systems, Inc., is a contractor of the Department of Energy and manages Department of Energy facilities in Oak Ridge, Tennessee. As one of its functions, Lockheed Martin Energy Systems, Inc., provides security services at the Oak Ridge facility. Complainant David High ("High") is employed by Lockheed Martin Energy Systems, Inc., as a Physical Training Coordinator and is responsible for supervising the physical training of security guards at the Oak Ridge facility. Lockheed Martin Energy Systems, Inc., is a wholly-owned subsidiary of Lockheed Martin Corporation.

In 1992, High began complaining that some guards were not fully participating in the exercise program required by the U.S.

Department of Energy regulations and that their acceptance of pay under these circumstances constituted waste, fraud, and abuse of taxpayer funds. Pursuant to 29 C.F.R. § 24.3 (1995), High filed a complaint of discrimination with the Department of Labor's Wage and Hour Division on December 11, 1995. High asserted that his comments regarding the exercise program constituted protected activity under both the environmental acts and the Energy Reorganization Act, and that Lockheed Martin Energy Systems, Inc., Lockheed Martin Corporation, and the U.S. Department of Energy illegally retaliated against him for engaging in such activity by giving him adverse performance appraisals and unequal pay, denying him promotions, and labeling him a troublemaker.

The Wage and Hour Division investigated High's complaint and concluded that it had no merit. High then requested review of that determination and the matter was referred to the Office of Administrative Law Judges for hearing.[1]

The case was assigned to the undersigned Administrative Law Judge. A Prehearing Order was issued and motions and argument were filed by the parties. The Respondents filed a Motion to Dismiss on July 9, 1997. After consideration of the arguments of the parties, a Recommended Decision and Order of Dismissal was issued on January 29, 1998, in which I recommended that the complaint be dismissed as to all Respondents. On appeal by the Complainant, the Administrative Review Board issued a Decision and Order of Remand, dated March 13, 2001. In its Decision, the Administrative Review Board dismissed all aspects of the complaint against Respondents Department of Energy and the Oak Ridge Operations Office, whether filed under the environmental acts or the Energy Reorganization Act. As to the case against Lockheed Martin Energy Systems, Inc., and Lockheed Martin Corporation, the Board dismissed those aspects of the complaint based upon alleged discrimination under the environmental acts; however, it remanded High's claim against Lockheed Martin Energy Systems, Inc., and Lockheed Martin Corporation under the Energy Reorganization Act.

The Administrative Review Board stated at page 7 of its Decision and Order that:

> High did not allege in his complaint that he ever complained to any of the Respondents that he believed security guards were violating 10 C.F.R. § 1046.12. However, he did allege that the guards were pretending to exercise when they were in fact not doing so, and were signing in as attending physical fitness training that

[1] The above three paragraphs are taken from the background as recited by the Administrative Review Board in its Decision and Order.

> they did not attend. While we view this as a very close call, we conclude that these allegations are sufficient to survive a motion to dismiss under the very charitable standard applicable to 12(b)(6) motions.

Following the Decision and Order of Remand, several pleadings were received from both parties. By Notice dated April 9, 2001, the parties were advised that no action could be taken because the administrative file had not yet been received from the Administrative Review Board. The parties were told that no further motions, pleadings, or requests were to be filed until the administrative file had been received. In an attempt to locate the record, several telephone calls were made to personnel at the Administrative Review Board and to the Office of Administrative Law Judges in Washington, D.C. According to the Administrative Review Board, the formal file was sent by messenger to the Office of Administrative Law Judges on April 17, 2001. According to the Office of Administrative Law Judges, the file was never received. On September 6, 2001, the parties were notified that the formal file was apparently lost.

The parties were instructed to confer and notify this Office how they wished to proceed. By letter dated November 22, 2001, the Complainant filed a request that this case be consolidated with a case pending before Administrative Law Judge Gerald M. Tierney. That request was denied. In order to reconstruct the file, an Order was issued on December 12, 2001, directing the parties to file, by December 28, 2001, a true and accurate index of all pleadings filed in this case. The parties were instructed to review the index of pleadings filed by the adverse party, and to file a statement, on or before January 7, 2002, that they either agreed or disagreed that it was an accurate listing of all pleadings. Respondents filed an Index of Pleadings on December 26, 2001. The Complainant did not file an index of pleadings. High filed a request on December 20, 2001, that this Court: (1) vacate or alter the Court's December 28, 2001 deadline for the parties to stipulate to the contents of the administrative record; and, (2) rule on his March 20, 2001 and March 31, 2001 discovery motions. By Order dated February 14, 2002, it was noted that the Complainant's motion was not in compliance with the Court's April 9, 2001 Order directing the parties to cease filing motions, pleadings, and requests until the receipt of the formal file.

On February 14, 2002, a Show Cause Order was issued which provided that the Index of Pleadings filed by the Respondents on January 10, 2002, would be adopted as the Index of Pleadings for the official file unless the Complainant show cause on or before February 25, 2002, that it was not complete and accurate. The Complainant did not respond to the Show Cause Order and the Index of Pleadings filed by the Respondents was determined to be complete and accurate.

By Order dated March 8, 2002, the parties were directed to confer and file a complete copy of the pleadings (as listed in the Index of Pleadings) on or before April 5, 2002. In the event that the parties could not agree, they were given until April 26, 2002 to individually file a copy of the pleadings. The Complainant did not file a response to the Order. On April 16, 2002, the Respondents filed a copy of the pleadings numbered from 1 through 89. In its letter of transmittal, Respondents' attorney wrote,

> On April 3, 2002, we sent Complainant's counsel, Edward R. Slavin, Jr., the same documents and index and asked him to submit any objections by April 8, 2002. We have received no response from Mr. Slavin. Therefore, pursuant to your March 8, 2002 order, we submit these as the reconstructed record.

By Order dated April 26, 2002, the Index of Pleadings and copy of the pleadings submitted by the Respondents were accepted as the official record of all documents filed and received through January 8, 2002. By the same Order, the record was opened for the filing of a proposed scheduling order, motions, and pleadings and the parties were directed to file a statement of the issues to be decided. Neither party responded. On June 7, 2002, a Notice of Hearing and Prehearing Order was issued scheduling the hearing for November 6, 2002. The Order also scheduled dates for completion of discovery and for the filing of a pre-trial submission. The Respondents filed a Motion to Reschedule the Hearing. By Order dated August 1, 2002, the hearing was rescheduled to commence on December 10, 2002.

On July 26, 2002, the Respondents filed a Motion for Summary Judgment and Memorandum in Support of the Motion. On August 1, 2002, the Complainant filed a Motion to Strike and Stay Summary Judgment Motion by Lockheed Martin Energy Systems, Inc. On August 1, 2002, the Respondents filed a Response to Complainant's Motion to Strike and Stay Summary Judgment Motion. A Show Cause Order was issued on August 15, 2002, directing the Complainant to show cause, in writing, on or before September 9, 2002, why the Respondent's Motion for Summary Judgment should not be granted. On September 9, 2002, the Complainant filed a Motion to Enlarge Time to Respond to Show Cause Order. The Complainant's Motion was granted, and he was ordered to comply with the Order on or before September 30, 2002. On October 7, 2002, the Complainant filed a Motion to Enlarge Time to Respond to Show Cause Order in which he stated that trial work, as well as a lack of responsive documents to the Complainant's September 4, 1996 discovery requests, has prevented work on a response to the Respondents' Motion for Summary Judgment. The Complainant stated that he was awaiting rulings on his March 20, 2001 and April 8, 2001 Motions to Compel and for Protective Order. No further response to the Motion for Summary Judgment or to the Show Cause Order was received. On November 20,

2002, an Order was issued cancelling the December 10, 2002, hearing pending a ruling on the Respondents' Motion for Summary Judgment.

March 20, 2001 and April 8, 2001 Discovery Motions

In his October 7, 2002 Motion to Enlarge Time to Respond to Show Cause Order, the Complainant wrote:

> Mr. High awaits a ruling on his March 20, 2001 and April 8, 2001 Motions to Compel and for Protective Order. Respondents have an affirmative duty to 'engage in the discovery process with an attitude of cooperation with an end toward clarifying the issues and expediting the hearing,' and a duty not to engage in 'dilatory, evasive or stalling tactics . . . ' (Cases cited) . . . Furthermore, 29 C.F.R. § 18.40 requires full discovery before summary judgment may be considered. Since Respondents still try to avoid discovery, summary judgment should not be entered for them. 29 C.F.R. § 18.40(d) provides that "[t]he administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion." (Mr. High's Motion to Enlarge Time to Respond to Show Cause Order, pp. 1-2).

The March 20, 2001 motion referred to by the Complainant is Complainant's Motion to Correct and Amend D&O, List of Counsel and Service Sheet, in which no discovery requests were made. As there were no discovery requests made in his March 20, 2001 motion, I will not address it further.

On April 8, 2001, the Complainant filed a Motion to Compel answers to the September 1996 discovery. Lockheed Martin Energy Systems, Inc., and Lockheed Martin Corporation responded to the Complainant's discovery requests on December 30, 1996, and objected to various questions at that time (DX 22). On February 21, 1997, Lockheed Martin Energy Systems, Inc., filed a Motion for Protective Order (DX 25). A Show Cause Order was issued on June 19, 1997, stating that it appeared that the Complainant had not made a prima facie case. The Order directed High to show cause on or before July 9, 1997, why his complaint should not be dismissed as to all parties due to his failure to state a claim on which relief could be granted. Lockheed Martin Energy Systems, Inc., and Lockheed Martin Corporation filed a Motion to Dismiss on July 9, 1997 (DX 31). The Complainant responded to the Show Cause Order on August 7, 1997 (DX 36). Lockheed Martin Energy Systems, Inc., filed a Reply Brief on August 26, 1997 (DX 38). Following consideration of the arguments of the parties, a Recommended Decision and Order of Dismissal was issued on January 29, 1998 (DX 39). Regarding the Complainant's April 8, 2001, Motion to Compel answers to the discovery filed in September 1996, I find

that the Complainant's September 4, 1996 discovery requests were rendered moot by the January 29, 1998 Recommended Decision and Order of Dismissal. Following remand by the Administrative Review Board, the parties were notified by Order dated April 26, 2002, that the record was open for the submission of discovery. A Notice of Hearing and Prehearing Order was issued on June 7, 2002, setting a discovery deadline of September 27, 2002. The Complainant failed to submit any discovery requests when given the opportunity to do so.

Administrative Law Judges have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion. Hasan v. Burns & Roe Enters., Inc., ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 4 (ARB Jan. 30, 2001).[2] It is appropriate for an Administrative Law Judge to suspend discovery pending a decision on a motion potentially dispositive of the case. Plumlee v. Corporate Express Delivery Systems, Inc., ARB No. 99-052, ALJ No. 98-TSC-9, at 2 (ARB June 8, 2001); Rockefeller v. Carlsbad Area Office, U.S. Dep't of Energy, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 98-CAA-10, 98-CAA-11, 99-CAA-1, 99-CAA-4, 99-CAA-6, slip op. at 18 (ARB Oct. 31, 2000). Further, summary judgment is appropriate even where the party opposing summary judgment has been denied discovery. See Hasan v. Burns & Roe Enters., Inc., ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 4 (ARB Jan. 30, 2001). Denial of discovery bars summary judgment only where the discovered information is "central to [the complainant's] claim." See id. The information which is the subject of the discovery request is not central to the Complainant's claim. Additionally, § 18.40(d) is discretionary, not mandatory.

For the above reasons, Complainant's 1996 discovery requests do not bar summary judgment.

Motion For Summary Judgment

In ruling on a motion for summary judgment, the Judge is required to draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing the motion. Hasan v. Burns & Roe Enterprises, Inc., ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001), citing, Troy Chemical Corp. v. Teamsters Union Local No. 408, 37 F.3d 123 (3d Cir. 1994). However, to defeat a motion for summary judgment,

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[2] The Administrative Law Judge's discretion to entertain a motion for summary judgment, even where discovery is pending, is noted in 29 C.F.R. § 18.40(d), which states that the Administrative Law Judge may deny a summary judgment motion when the moving party denies access to information by means of discovery to a party opposing the motion.

the nonmoving party must still establish that there is a genuine issue of material fact and must do so through some means other than mere speculation or conjecture. See id. The Supreme Court has held that a summary judgment motion,

> . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate that there is a genuine issue for trial.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

A motion for summary decision in a case brought under the Energy Reorganization Act is governed by 29 C.F.R. § 18.40 and 18.41. See, e.g., Kesterson v. Y-12 Nuclear Weapons Plant, et al., 95-CAA-12, (ARB Apr. 8, 1997); Trieber v. Tennessee Valley Authority, et al., Case No. 87-ERA-25, Sec. Dec. and Ord., Sept. 9, 1993, slip op. at 7-8. Twenty-nine C.F.R. § 18.41 states:

> (a) No genuine issue of material fact. (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision issued as a summary decision shall conform to the requirements for all final decisions.

A party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). Under the analogous Fed. R.Civ.P. 56(e), the nonmoving party may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. See Kesterson, supra, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-257 (1986). The party opposing summary judgment must present affirmative evidence in order to defeat a properly supported motion for summary judgment. See id. The nonmoving party's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. See Bryant v. Ebasco Services, Inc., Case No. 88-ERA-31, Dec. and Order of Rem., July 9, 1990, slip. op. at 4.

If the nonmovant fails to make a showing sufficient to establish the existence of an element essential to that party's case, there is no genuine issue of material fact, and the movant is entitled to summary judgment. Kesterson, supra, citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986).

In their Memorandum in Support of the Motion for Summary Decision, the Respondents argue that summary judgment is proper

because: (1) the Complainant was not engaged in a protected activity; (2) most of the alleged adverse actions in the complaint took place outside the Energy Reorganization Act's 180-day statute of limitations; and, (3) those alleged adverse actions that did occur within the 180-day statute of limitations were not adverse actions under the Energy Reorganization Act, and were not motivated by the alleged protected activities.

In order to prevail in a whistleblower protection case based upon circumstantial evidence of retaliatory intent, it is necessary to prove that: (1) the complainant was an employee of a covered employer; (2) the complainant engaged in a protected activity; (3) the complainant thereafter was subjected to adverse action regarding his or her employment; (4) the respondent knew of the protected activity when it took the adverse action; and, (5) the protected activity was the reason for the adverse action. See Saporito v. Florida Power & Light Co., 94-ERA-35 (ARB July 19, 1996), citing Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984); Carroll v. Bechtel Power Corp., Case No. 91-ERA-46, slip op. at 11 n.9 (Sec'y Feb. 15, 1995). In cases arising under the Energy Reorganization Act, the dispositive issue is whether an employee has been discriminated against because the employee engaged in an activity protected under that section. See Richter v. Baldwin Associates, 84-ERA-9 (Sec'y Mar. 12, 1986). If there is no protected activity or, where there is a protected activity but no discrimination because of such activity, there is no cause of action. See id.

In its March 13, 2001 Decision and Order of Remand, the Administrative Review Board stated that Lockheed Martin Energy Systems, Inc.'s physical fitness program at the Department of Energy's Oak Ridge facility is mandated by 10 C.F.R. Part 1046, which governs the physical protection of security interests and establishes physical fitness standards for contractor security personnel at the Department of Energy facilities. These regulations were promulgated by the Department of Energy pursuant to the Atomic Energy Act of 1954, 42 U.S.C.A. § 2011. Employee concerns about alleged violations of the Atomic Energy Act or the regulations promulgated thereunder are protected under the Energy Reorganization Act. The Administrative Review Board wrote, at page 7:

> Therefore, a complaint that security guards were violating 10 C.F.R. Part 1046 by refusing or failing to participate in a [Department of Energy]-approved physical fitness program, as required by § 1046.12(d), might constitute an activity protected under the Energy Reorganization Act (emphasis added).

> High did not allege in his complaint that he ever complained to any of the Respondents that he believed security guards were violating 10 C.F.R. § 1046.12. However, he did allege that the guards were pretending to exercise when they were in fact not doing so, and were signing in as attending physical fitness training that they did not attend. While we view this as a very close call, we conclude that these allegations are sufficient to survive a motion to dismiss under the very charitable standard applicable to 12(b)(6) motions.

The Administrative Review Board noted, at footnote 5, that the Respondents are not precluded from seeking dismissal on some other ground or from moving for summary judgment.

In their July 26, 2002 Motion for Summary Judgment, the Respondents wrote, at page 3:

> Complainant did not raise nuclear safety concerns, but instead had for many years urged orally and in many, many documents his perceived concerns regarding fiscal fraud, waste and abuse [footnote omitted] in the physical training program and some additional concerns that are clearly covered by OSHA statutes and regulations, not the ERA.

The Respondents argue that the Complainant's "main concern" was his belief that some of the security police officers were not exerting sufficient effort during their physical fitness training sessions. Id. This is supported by the language of High's December 12, 1995 complaint, at paragraphs four and five. High's complaint states, at page 2:

> 4. The essence of Mr. High's protected activity is that Oak Ridge facilities fail to comply with the DOE Orders and regulations, supra, wasting tax money and risking environmental violations. Reacting to radioactive and toxic spills and to terrorist attacks alike is largely dependent on having an alert and physically fit Protective Force. Despite eight years of investing millions of dollars, the Oak Ridge SPOs are very similar in aerobic fitness levels to the average sedentary untrained American population.
>
> 5. The essence of Mr. High's protected activity is that neither Lockheed Martin Energy Systems, Inc. nor DOE has followed the LMES security motto of "DWYSYWD (Do What You Say YOU Will Do)" regarding 10 C.F.R. Part 1046 . . . (Emphasis added).

As noted, the Administrative Review Board wrote that a complaint that security guards were violating 10 C.F.R. Part 1046 by refusing or failing to participate in a Department of Energy-approved physical fitness program, as required by § 1046.12(d), might constitute an activity protected under the Energy Reorganization Act. In fact, High's complaint cites Part 1046, and specifically notes that the purpose of this part is,

> . . . to ensure that protective force personnel at DOE can perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site and the general public.

See Complaint, p. 6. However, High fails to offer anything more than conjecture as to possible danger, and fails to allege a nexus between the expression of his concerns and retaliation by the Respondents. Additionally, High's complaint and subsequent motions fail to identify specific instances and dates of retaliatory measures taken against him. For example, in paragraphs 7 and 8 of his complaint, High wrote:

> 7. In retaliation for expressing concerns to DOE and top LMES managers, Mr. High has been branded a 'troublemaker' and 'not a team player.'
>
> 8. Mr. High has received adverse performance appraisals, receives unequal pay to this day, and was denied the routine raises and promotions accorded others similarly situated reporting to Mr. Clements (Complaint, pp. 2-3).

High does not allege that he was discriminated against based on his actual knowledge that the protective force was unable to perform their duties. Instead, he speculates that the protective force may not be able to perform. For example, at page 4, paragraph 15.A. of High's complaint, he refers generally to "injuries, muscle atrophy, physical detraining, and spare tires among the guard force," but does not argue that he complained of any specific instances of the guards' actual inability to perform. As stated by the Administrative Review Board in Kesterson, supra, the Act protects employees for making safety and health complaints "grounded in conditions constituting reasonably perceived violations" of the environmental laws, but does not protect an employee simply because he subjectively thinks the complained of employer conduct might affect the environment. Kesterson, supra, citing Johnson v. Old Dominion Security, Case Nos. 86-CAA-3, 4, 5 (Sec'y Dec. May 29, 1991), slip op. at 15; Crosby v. Hughes Aircraft Co., Case No. 85-TSC-2, (Sec'y Dec. Aug. 17, 1993), slip op. at 26. See also, Devareux v. Wyoming Association of Rural Water, 93-ERA-18 (Sec'y Dec. Oct. 1, 1993) (finding a complaint was properly dismissed because complaints about inaccurate records, mismanagement and waste did not constitute a violation of the

employee protection provision of the Energy Reorganization Act or any of the other environmental whistleblower protection provisions).

In Keene v. Ebasco Constructors, Inc., 95-ERA-4 (ARB Feb. 19, 1997), the complainant complained to a supervisor that his partner was taping cable wire in violation of quality control procedures, and about falsification of records. The Board distinguished DeCresci v. Lukens Steel Co., 87-ERA-13 (Sec'y Dec. 16, 1993), in which the complainant's concerns were about welding procedures in the construction of sonarspheres for nuclear submarines. In DeCresci, the Secretary found that the complainant's concerns were not related in any way to activities regulated under the Energy Reorganization Act and nuclear or radiation safety and, therefore, were not the type of environmental concerns that the Energy Reorganization Act whistleblower provision was intended to reach. In contrast, the Board found that Keene involved "an allegation of retaliation based on complaints about improprieties related to the performance of electrical work within an operating nuclear power plant, and comes within the purview of the Energy Reorganization Act's whistleblower provision." Slip op. at 7. The Board also noted that the fact that the Nuclear Regulatory Commission investigated and concluded that the particular cable and work packages at issue were not safety related, was not dispositive because the complainant had a reasonable belief that his employer was violating the Energy Reorganization Act's requirements.

Unlike the complainant in Keene, High has not alleged that he engaged in activities that fall within the protection of the Energy Reorganization Act because his complaints address either the fraud and waste issues or the issue of unfit guards, which the Administrative Review Board determined to be "speculative conjecture." Further, High is unable to identify specific instances and dates of retaliatory measures taken against him. Therefore, I find that the complaint does not allege a violation of the employee protection provisions of the Energy Reorganization Act.

Statute of Limitations Under the Energy Reorganization Act

Respondents argue that High's complaint cannot withstand a summary judgment motion because most of the alleged adverse actions took place outside the Energy Reorganization Act's 180-day statute of limitations, and those alleged adverse actions that did occur within the 180-day statute of limitations were not adverse under the Energy Reorganization Act, and were not motivated by the alleged protected activities. As noted by the Respondents, 42 U.S.C. § 5851(b)(1) states:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in

> violation of subsection (a) of this section may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the 'Secretary') alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.
>
> Twenty-nine C.F.R. § 24.3 (c) states:
>
> Form of complaint. No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation. (Emphasis added.)

Although the complaint states that Mr. High "has raised concerns repeatedly since 1992" (Complaint, p. 4), it does not include a "full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation," as required. Because the complaint excludes the "pertinent dates," a required element of the complaint pursuant to § 24.3(c), I find that the Complainant failed to properly plead his case, and has not shown that his claim is timely.

Lockheed Martin Corporation's Status as a Respondent

I have found that the Complainant did not engage in activity protected by the Energy Reorganization Act. Assuming, arguendo, that the Complainant did establish that he engaged in activity protected by the Energy Reorganization Act, Lockheed Martin Corporation's status as a proper respondent will be reviewed. The Administrative Review Board wrote, at footnote 6:

> LMC argues that it is not a proper respondent in this case. The ALJ should address this question on remand in light of the applicable case precedent. See, e.g., Stephenson v. NASA, ARB No. 98-025, ALJ No. 94-TSC-5 (ARB July 18, 2000).

In Stephenson, the Administrative Review Board held that the reach of the Clean Air Act employee protection provision may, depending on the specific facts of a case, encompass an employee who is not a common law employee of the respondent employer.

In their Motion for Summary Judgment, the Respondents argue that Lockheed Martin Corporation should be dismissed because it is not an employer under the Energy Reorganization Act and is not, therefore, a proper respondent. The Respondents argue that High does not allege that Lockheed Martin Corporation was his employer,

or that Lockheed Martin Corporation took any adverse action against him. As noted by the Respondents, Lockheed Martin Energy Systems, Inc., is a wholly owned subsidiary of Lockheed Martin Corporation. Until October 31, 2000, Lockheed Martin Energy Systems, Inc., was the operating contractor for the Department of Energy's Oak Ridge facilities. Therefore, the Complainant was an employee of Lockheed Martin Energy Systems, Inc.

The Respondents argue that Varnadore v. Martin Marietta Energy Systems, DOE, 92-CAA-5, 93-CAA-1, 94-CAA-2, 94-CAA-3, 95-ERA-1 (ARB June 14, 1996), and Kesterson v. Y-12 Nuclear Weapons Plant, et al., 95-CAA-12, (ALJ Aug. 5, 1996), (ARB Apr. 8, 1997), support their position that a parent corporation cannot be sued because its subsidiary has allegedly committed discriminatory acts. In Varnadore, the Administrative Review Board determined that parent companies have no individual liability in a whistleblower complaint. In Kesterson, the Administrative Review Board dismissed the parent companies because there was no allegation that they employed the complainant.

As noted by the Respondents, the Complainant did not allege that Lockheed Martin Corporation was his employer, or that Lockheed Martin Corporation took any adverse action against him. See Varnadore, supra, (respondents dismissed by the Administrative Review Board because they were not alleged to have employed the complainant, and were merely parent companies of the complainant's employer). As noted by the Administrative Review Board in Varnadore, an employment relationship between the complainant and the respondent is an essential element of any claim brought under the Acts. Id. at 57-61. I find that the complaint fails to state a claim against Lockheed Martin Corporation because it does not allege that Lockheed Martin Corporation is the Complainant's employer, or that the Complainant was an employee of Lockheed Martin Corporation. Accordingly, the complaint against Lockheed Martin Corporation must be dismissed.

Conclusion

Based upon the foregoing, I find that the Complainant does not allege a violation of the employee protection provisions of the Energy Reorganization Act because he has not alleged facts which show that he engaged in a protected activity, or that adverse action was taken against him in retaliation for a protected activity. The complaint excludes the pertinent dates of retaliation, as required by the regulations, and is not shown to be timely. Lockheed Martin Corporation is not a proper respondent. Therefore, summary judgment is proper in this case.

RECOMMENDED ORDER

Upon consideration of the record and the arguments of the parties, it is, therefore,

RECOMMENDED that the Secretary of Labor DISMISS Lockheed Martin Corporation as a Respondent. It is further,

RECOMMENDED that the Secretary of Labor GRANT the Respondents' Motion for Summary Judgment and DISMISS this complaint as to both Lockheed Martin Corporation and Lockheed Martin Services, Inc.

A

Robert L. Hillyard
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C., 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.